A

Mohd Fairus bin Salleh v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO K-05–133–05 OF 2013
MOHTARUDIN BAKI, TENGKU MAIMUN AND AHMADI ASNAWI JJCA
18 MAY 2015

C

Criminal Procedure — Trial — Misdirection — Trial judge made findings of fact against weight of evidence — Trial judge found accused rode motorcycle containing cannabis in its basket to crime scene when evidence only showed he was sitting on motorcycle parked by roadside — Whether accused's evidence that he was D *pillion and waiting for rider of motorcycle to return corroborated by rider's testimony — Whether accused's explanation why he ran when accosted by policeman reasonable — Whether mere fact he fled could not attribute knowledge of the drugs to accused — Whether trial judge wrong to hold accused's defence was afterthought*

E

The appellant was sentenced to death by the High Court after he was found guilty of trafficking in 4,585.5g of cannabis, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). The police officer ('PW3') who arrested the appellant testified that while he was making his rounds in his car F with his fellow officers, he noticed the appellant sitting alone on a motorcycle parked on the roadside near a police station. He stopped his car directly behind the motorcycle, identified himself as a police officer and was approaching the appellant when the latter ran towards the fence of the police station. The officers chased after and arrested the appellant. PW3 later found the cannabis G in the basket of the motorcycle. The appellant's defence was that the motorcycle belonged to his friend, SP5, whom he had accompanied as a pillion at the material time. When they were near the said police station, SP5 received a phone call and he stopped the motorcycle by the roadside to cross the road to meet someone leaving the appellant alone with the motorcycle. The appellant H testified that while he was waiting for SP5 to return, a car suddenly stopped near him and out of it came someone shouting at him. Thinking that he would be assaulted or robbed, the appellant ran towards the police station but was subdued by the pursuing men. The appellant denied the cannabis belonged to him. At the end of the prosecution's case, the trial judge found the prosecution I had proven that the appellant had physical possession of the cannabis as he was 'riding' the motorcycle at the time and must have had custody and control of the drugs. The judge found the appellant's conduct in fleeing when PW3 identified himself showed he knew the basket of the motorcycle contained the cannabis. The trial judge also held that the prosecution was entitled to invoke

the presumption of trafficking against the appellant under s 37(da) of the DDA. After hearing the defence, the trial judge rejected it as an afterthought as it was never put to the prosecution's witnesses but was only raised at the defence stage. The court also held the appellant failed to rebut the presumption of trafficking or to raise a reasonable doubt on the prosecution's case. In the instant appeal against conviction and sentence, it was argued that the trial judge erred in: (a) finding that the appellant had ridden the motorcycle to the scene when the only evidence was that he was seen sitting on the vehicle by the roadside as was confirmed by SP5 in his testimony; and (b) finding the defence to be an afterthought.

Held, allowing the appeal, setting aside the conviction and sentence and acquitting and discharging the appellant:

(1) The trial judge had made findings of facts not supported by the evidence. PW3 did not testify that he saw the appellant coming to the place riding the motorcycle. He clearly said that he merely saw the motorcycle parked on the side table of the road next to the police station and the appellant was sitting astride on it. At the highest, the evidence merely revealed proximity of the appellant to the drugs (see paras 10–11).

(2) The appellant's conduct of fleeing was no ground to attribute knowledge of the said drugs to him. It was subject to the explanation given by the appellant and he gave a sufficient account for his conduct in fleeing the scene when accosted by PW3. His evidence that a car stopped suddenly behind the motorcycle and out came somebody who shouted at him and he fled thinking somebody wanted to assault or rob him was a reasonable explanation having regard to all the circumstances of the case in particular the time frame he was accosted by PW3 (see para 12).

(3) When SP5 was cross-examined, he agreed to the question put to him that he stopped the motorcycle near the police station and left the appellant alone to go meet someone. There was no reason for SP5 to agree with that question if what was put to him did not take place. There, therefore, appeared to be a real doubt whether the appellant came alone to the crime scene riding the motorcycle or that it was SP5 who rode the machine with the appellant as pillion and that the appellant was left alone when SP5 crossed the road to meet someone. The benefit of the doubt, in law, had to be given to the appellant. In the circumstances, it could not be said that the defence was an afterthought (see paras 13–14 & 16).

(4) In view of the serious misdirections in the findings made by the trial judge, the appellant's conviction was unsafe (see para 17).

[Bahasa Malaysia summary

Perayu telah dihukum mati oleh Mahkamah Tinggi selepas dia didapati bersalah kerana mengedar 4,585.5g kanabis, satu kesalahan di bawah s

39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pegawai polis ('PW3') yang menangkap perayu memberi keterangan bahawa semasa dia membuat rondaan dalam keretanya bersama pegawai lain, dia nampak perayu sedang duduk bersendirian atas motorsikal yang diparkir di tepi jalan berhampiran balai polis. Dia memberhentikan keretanya di belakang motorsikal itu, memperkenalkan dirinya sebagai pegawai polis dan sedang menuju ke arah perayu apabila perayu lari ke arah pagar balai polis. Pegawai-pegawai lain mengejar dan menangkap perayu. PW3 kemudian menemui kanabis dalam bakul motorsikal itu. Pembelaan perayu adalah bahawa motorsikal itu milik kawannya, SP5, yang ditemaninya sebagai pembonceng pada masa matan. Apabila mereka dekat dengan balai polis tersebut, SP5 menerima panggilan telefon dan dia memberhentikan motorsikal itu di tepi jalan untuk melintas jalan untuk berjumpa dengan seseorang dan meninggalkan perayu berseorangan dengan motorsikal itu. Perayu memberi keterangan bahawa semasa dia menunggu SP5 datang balik, sebuah kereta tiba-tiba berhenti dekatnya dan keluar seseorang yang menjerit kepadanya. Oleh kerana berfikir dia akan diserang atau dirompak, perayu telah lari ke arah balai polis itu tetapi ditahan oleh orang yang mengejarnya. Perayu menafikan kanabis itu miliknya. Di akhir kes pendakwaan, hakim perbicaraan mendapati pendakwaan telah membuktikan bahawa perayu mempunyai milikan fizikal kanabis itu kerana dia sedang 'riding' motorsikal itu pada masa itu dan mesti mempunyai jagaan dan kawalan dadah itu. Hakim mendapati perlakuan perayu melarikan diri apabila PW3 memperkenalkan dirinya menunjukkan dia mengetahui yang bakul motorsikal itu mengandungi kanabis. Hakim perbicaraan juga memutuskan bahawa pendakwaan berhak menggunakan andaia pengedaran terhadap perayu di bawah s 37(da) ADB. Selepas mendengar pembelaan, hakim perbicaraan menolaknya sebagai suatu yang telah difikirkan kemudian kerana ia tidak pernah mengutarakan kepada saksi-saksi pendakwaan tetapi hanya ditimbulkan di peringkat pembelaan. Mahkamah juga memutuskan perayu telah gagal mematahkan andaian pengedaran atau menimbulkan keraguan munasabah ke atas kes pendakwaan. Dalam rayuan terhadap sabitan dan hukuman, ia dihujahkan bahawa hakim perbicaraan terkhilaf dalam: (a) penemuan bahawa perayu telah menunggang motorsikal itu ke tempat kejadian walhal satu-satunya keterangan adalah dia dilihat duduk atas kenderaan itu di tepi jalan seperti yang disahkan oleh SP5 dalam keterangannya; dan (b) penemuan bahawa pembelaan itu suatu yang telah difikirkan kemudian.

Diputuskan, membenarkan rayuan, mengetepikan sabitan dan hukuman dan melepas dan membebaskan perayu:

(1) Hakim perbicaraan telah membuat penemuan fakta yang tidak disokong oleh keterangan. PW3 tidak memberi keterangan yang dia telah melihat perayu datang ke tempat itu dengan menunggang motorsikal. Dia jelas menyatakan bahawa dia hanya melihat motorsikal itu diparkir di tepi

selekoh jalan bersebelahan balai polis dan perayu sedang duduk di atasnya. Paling tidak, keterangan itu hanya menunjukkan kaitan rapat perayu dengan dadah itu (lihat perenggan 10–11).

(2) Perlakuan perayu melarikan diri bukan alasan untuk menganggap wujud pengetahuan tentang dadah tersebut terhadapnya. Ia tertakluk kepada penjelasan yang diberikan oleh perayu dan dia telah memberikan laporan mencukupi tentang perlakuannya melarikan diri daripada tempat kejadian apabila dihampiri oleh PW3. Keterangannya bahawa sebuah kereta telah berhenti tiba-tiba di belakang motorsikal itu dan keluar seseorang yang menjerit kepadanya dan dia melarikan diri kerana memikirkan seseorang ingin menyerang atau merompaknya adalah penjelasan yang munasabah dengan mengambil kira semua keadaan kes pada jangka masa tertentu dia dihampiri oleh PW3 (lihat perenggan 12).

(3) Apabila SP5 diperiksa balas, dia bersetuju dengan persoalan yang dikemukakan kepadanya bahawa dia telah memberhentikan motorsikal itu berhampiran balai polis dan meninggalkan perayu sendirian untuk berjumpa seseorang. Tiada sebab untuk SP5 bersetuju dengan soalan itu jika apa yang diutarakan kepadanya tidak berlaku. Oleh itu, terdapat keraguan sebenar sama ada perayu datang bersendirian ke tempat kejadian menunggang motorsikal itu atau bahawa ia adalah SP5 yang menunggang motorsikal itu bersama perayu sebagai pembonceng dan bahawa perayu telah ditinggalkan sendirian apabila SP5 melintas jalan untuk berjumpa seseorang. Manfaat keraguan, dari segi undang-undang, perlu diberikan kepada perayu. Dalam keadaan sedemikian, ia tidak boleh dikatakan bahawa pembelaan itu suatu yang telah difikirkan kemudian (lihat perenggan 13–14 & 16).

(4) Berdasarkan salah arah serius dalam penemuan yang dibuat oleh hakim perbicaraan, sabitan perayu tidak selamat (lihat perenggan 17).]]]]]

Notes

For cases on misdirection, see 5(3) *Mallal's Digest* (5th Ed, 2015) paras 5833–5848.

Legislation referred to

Dangerous Drugs Act 1952 s 37(da)

Appeal from: Criminal Trial No 45A-46–08 of 2012 (High Court, Alor Setar)

Rajadevan (Rajadevan & Assoc) for the appellant.
Fairuz Johari (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmad Asnawi JCA:

[1] The appellant was charged with the following offence:

> Bahawa kamu pada 26hb. Februari 2012, jam lebih kurang 8.00 malam, di tepi Jalan Tikam Batu – Kota Kuala Muda, pekan Tikam Batu, dalam Daerah Kuala Muda, dalam Negeri Kedah Darul Aman, telah didapati mengedar dadah berbahaya iaitu cannabis seberat 4585.5 gram. Oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya, 1952, yang boleh dihukum di bawah seksyen 39B Akta yang sama.

[2] The appellant was ordered to enter his defence upon proof of a prima facie case being established against him. Having heard his defence, the learned judicial commissioner (hereinafter referred to as 'trial judge' for purposes of convenience) found him guilty of the offence and convicted him of the same. He was sentenced to death.

[3] The appeal before us was in respect of the said conviction and sentence. We heard the appeal and after due consideration of the issues raised, we allowed the appeal and we now give our reasons.

THE CASE FOR THE PROSECUTION

[4] The narratives are as follows:

(a) on 26 February 2012 at about 5.30pm, SP3 (ASP Abdul Razak bin Osman) received information of a drug trafficking activity, to take place within Tikam Batu township purportedly that same evening;

(b) SP3 proceeded to brief his team of the action to be taken to apprehend the wrongdoer(s). In his team were SP4 (Insp Suhaimi bin Saad) and 12 others from the Narcotics Unit, IPD, Kuala Muda. Each were then assigned specific tasks at the would-be crime scene as indicated in the charge;

(c) SP4 was to mount surveillance duties at the bus stop next to Balai Polis Tikam Batu whereas L/Corp Faizal and PC Hilmi were to conduct the same within the vicinity of the bus station. The others, including SP3, were to go on patrol rounds within the area using their own vehicles;

(d) SP3 did his rounds in his own motorcar. Corp Shafiee and Corp Md Zin were with him. SP3 drove the motorcar. At about 8pm, he saw a motorcycle parked (*berhenti*) on the road shoulder, next to Balai Polis Tikam Batu. He went towards the said motorcycle and stopped his motorcar directly behind the said motorcycle. His motorcar was very close to the said motorcycle;

(e) SP3 next alighted from his motorcar and identified himself as a police

officer to a male who was sitting astride the said motorcycle. The said male was alone. The said male bolted immediately. The motorcycle fell to the ground. The said male ran towards the fence (*pagar*) of Balai Polis Tikam Batu;

(f) SP3 and Corp Shaffie gave chase. About 15–20 meters away from where the motorcycle was parked, Corp Hilmi and PC Faizal managed to intercept the said male. There was a struggle before the said male was eventually subdued and arrested. The said male was subsequently identified by SP3 as the appellant;

(g) SP3 brought the appellant back to where the motorcycle fell. The motorcycle was a Yamaha LC 125 model and carried the registration number PHX 6569;

(h) from inside the basket (*raga*) of the said motorcycle, SP3 found a blue coloured plastic packet (exh P9). Inside the said blue coloured plastic packet were five compressed blocks (*ketulan mampat*) suspected to be cannabis, one of which had jutted out and wrapped in translucent plastic sheet whilst the four other packets were also wrapped in translucent plastic sheets with the outer layer wrapped further by newspaper cuttings (exhs P10A, P10B, P11A, P11B, P12A, P13A, P13B, P14A and P14B);

(i) the appellant was arrested by SP3 and subsequently handed to the investigating officer (IO) of the case, SP6 (Insp Nazroo Hissam bin Abdullah) together with the incriminating exhibits;

(j) the five compressed blocks were subsequently analysed by the chemist, SP2 (Marhayani bt Md Saad), who found and confirmed the same to be cannabis weighing 4585.5g (exhs P10, P11, P12, P13 and P14), now the subject matter of the charge levelled against the appellant (herein after referred to as 'the said drugs');

(k) further investigation revealed that the said motorcycle was registered under the name of SP5 (Mohd Zaini bin Shafiee), a friend of the appellant. SP5 testified that the said motorcycle was his and he had used the motorcycle on the said instant until about noon. Thereafter he parked his motorcycle in the parking lot below the flat he was residing. He did not leave anything behind and the basket of his motorcycle did not contain anything when he left his motorcycle at the parking lot; and

(l) SP5 further testifiedthat he had wanted to go back to Ampang, Selangor. He decided to borrow the appellant's motorcar as his own motorcar was still in the workshop undergoing repairs. The appellant allowed him to borrow his motorcar. In return, SP5 gave the keys of his motorcycle for

the appellant to use. Again, the appellant was agreeable as according to him, it would be faster for him reach his working place using a motorcycle.

FINDING OF TRIAL JUDGE AT END OF PROSECUTION'S CASE

[5] The trial judge found that the prosecution had succeeded to prove that the appellant had physical possession of the said drugs. As the appellant was riding the said motorcycle, he must have had custody and control of the plastic bag containing the said drugs on account that the same was openly placed in the basket of the said motorcycle. Additionally the conduct of the appellant in fleeing the scene almost immediately upon SP3 identifying himself as a police officer showed that the accused knew that the contents in the plastic bag were dangerous drugs.

[6] The trial judge further found that grounded upon the weight of the said drugs, the prosecution could rely on the presumption under s 37(da) of the Dangerous Drugs Act 1952 (herein after referred to as 'the Act') to prove that the appellant was trafficking in the said drugs until the contrary is proved.

THE CASE FOR THE DEFENCE

[7] The appellant posited the following:

(a) he was an ambulance driver before his arrest and resided at Blok A, Taman Sungei Dua Utara;

(b) he had known SP5 for 15–16 years. They were schoolmates. SP5 resided at the same housing estate;

(c) on the day in question (26 February 2012), he met SP5 at the housing estate at about 6.30pm SP5 wanted to borrow his motorcar and had also requested to accompany him (SP5) to go to Tikam Batu town. He allowed SP5 to borrow his motorcar and also agreed to accompany SP5 to Tikam Batu;

(d) he accompanied SP5 to Tikam Batu. He rode pillion on SP5's motorcycle. SP5 was the rider. They left at about 6.40–6.45pm and reached Tikam Batu at about 7.15pm;

(e) SP5 then received a phone call which prompted him to make a U-turn and proceeded back towards the direction of Balai Polis Tikam Batu. SP5 stopped his motorcycle next to Balai Polis Tikam Batu. SP5 then alighted from his motorcycle and hurriedly crossed the road to meet someone. SP5 requested him to wait for him. This was at about 7.30pm;

(f) he sat a stride on the motorcycle and waited for SP5 to come back. While waiting for SP5's return, a motorcar made a sudden stop at the rear of the motorcycle. Someone then shouted 'Hoi!' at him. He ran towards the *balai polis*, thinking that somebody wanted to assault or rob him. He failed in his attempt to flee and was detained very soon after;

(g) he was brought back to the motorcycle. He saw a package(*bungkusan*) laying on the ground, outside the motorcycle's basket. He has no knowledge of the contents of the said package;

(h) he saw the said package in the basket while riding pillion earlier but did not ask SP5 what the package was all about. He would have enquired had he been ask to hold the said package. He denied that the said package was his and equally denied having in his possession the cannabis found by SP3 on that instant; and

(i) he also denied coming/riding alone to the location without SP5 and denied borrowing the said motorcycle from SP5.

FINDINGS OF TRIAL JUDGE AT THE END OF DEFENCE CASE

[8] The trial judge found the appellant's defence to be mere afterthought. The essence of the defence was never put across to the main witnesses of the prosecution. It was raised for the first time only at the defence stage. The defence was hence rejected. The trial judge also found that the appellant's defence had failed to raise a reasonable doubt upon the prosecution's case and had equally failed to rebut the statutory presumption of trafficking in the said drugs invoked against him under s 37(da) of the Act. The appellant was found guilty and convicted of the offence as charged. He was sentenced to death.

THE APPEAL BEFORE US

[9] Counsel for the appellant submitted that:

(a) the trial judge erred when he made findings of facts not supported by the evidence adduced. At p 126 para 4 of the *rekod rayuan* ('RR'), the trial judge stated that SP-3 saw the appellant coming to the said place riding a motorcycle with the registration number PHX 6595. Counsel submitted that during the trial no one said that they saw the appellant riding a motorcycle. They said they saw the appellant sitting on the motorcycle;

(b) SP5 in cross-examination agreed (he used the word 'setuju') when it was put to him that it was he (SP5) who stopped the motorcycle in front of Balai Polis Tikam Batu and left the appellant alone while he went to see

someone (at p 42 RR). However the trial judge fell into error when he chose to accept the complete reversal in SP5's answer given in re-examination; and

(c) the trial judge was also in error when he found that he appellant's defence was an afterthought.

On these grounds counsel submitted that there were serious misdirections by the trial judge that caused the appellant to be gravely prejudiced.

OUR FINDINGS

[10] We were in agreement with counsel's submission that the trial judge had made findings of facts not supported by the evidence adduced during trial. We have gone through the records and found that PW3 did not testify that he saw the appellant coming to the place riding motorcycle no PHX 6569 and stopped by the roadside next to Balai Polis Tikam Batu as found by the trial judge. SP3, the arresting officer merely said, at p 14 RR:

> Pada jam lebih kurang 8.00 malam, semasa berada atas jalanraya berdekatan dengan Balai Tikam Batu nampak sebuah motorsikal berhenti di bahu jalan sebelah kanan iaitu bersebelahan dengan Balai Polis Tikam Batu. Saya terus memandu kereta berhenti betul-betul di belakang motorsikal yang saya nampak tadi.

[11] This finding was clearly the basis of the trial judge's ultimate finding that the said drugs was in the possession of the appellant. At para 29, p 139 RR, the trial judge stated:

> ... OKT yang menunggang motorsikal tersebut sudah pasti mempunyai kawalan dan jagaan ke atas beg plastik yang mengandungi dadah tersebut memandangkan beg plastik itu diletakkan secara terbuka di dalam raga motorsikal tersebut.

This finding could not be further from the truth as PW3 clearly stated that he merely saw a motorcycle stopped/parked on the side table of the road next to Balai Polis Tikam Batu with the appellant sitting astride on it. Hence at the highest the evidence merely revealed proximity of the appellant with the said incriminating exhibits.

[12] Conduct of flight is no ground to attribute knowledge on the part of the appellant of the said drugs in the plastic bag placed in the basket of the motorcycle. It is subject to the explaination to be given by the appellant. In our view, the appellant has given a sufficient account of his conduct in fleeing from the scene upon being accosted by SP3. It is his evidence that a motorcar stopped suddenly behind the motorcycle and out came somebody who shouted at him. He fled towards the *balai polis* thinking somebody wanted to assault or rob him. This explanation appears reasonable to us having regard to all the circumstances of the case in particular the time frame he was accosted by SP3.

[13] SP5 was cross-examined on the following issues (at p 42 RR): **A**

Q: Saya katakan pada hari kejadian 26/2/2012 kamu yang menunggang motorsikal PHX 6569?

A: Tidak setuju.

Q: Kamu berhentikan motorsikal di depan Balai Polis Tikam Batu meninggalkan OKT sendirian bila kamu nak jumpa seseorang? **B**

A: Setuju.

The latter question is obviously very plain, clear and simple. There is no reason for SP5 to 'setuju' with the said question if what was put did not take place. There is nothing to suggest that he did not understand the question. Neither did SP5 called for a repetition of the question if the question appears vague to him or requires further clarification. Of course in re-examination, SP5 said something else. However he did not explain why he answered 'setuju' to the pertinent question put to him earlier under cross-examination. **C** **D**

[14] In such event there appears to be a real doubt whether the appellant indeed came alone to the crime scene riding motorcycle PHX 6569 or he came riding pillion on the said motorcycle ridden by SP5 and later left alone thereat when SP5 crossed the road to meet someone as suggested by the defence. The benefit of the doubt must in law, be given to the appellant. **E**

[15] Of equal importance is the trial judge's understanding of SP5's evidence, evinced at p 138, para 28, wherein he stated: **F**

> Apabila ditimbangkan keseluruhan keterangan SP5, dapat difahami bahawa SP5 telah memandu motokar ke tempat itu dan beliau kemudian meninggalkan OKT bersendirian di atas motorsikal semasa berjumpa kawannya ...

Again, in our view this is not supported by the evidence. SP5 did not testify that he went to the said location in a motorcar. Neither did he say that he left the appellant alone on the said motorcycle when he went to meet his friend. In any event, if true, what is the purpose of SP5 going to the said location in a motorcar and leaving the appellant alone on the said motorcycle? **G**

H

[16] We also note that the thrust of the appellant's defence was grounded upon the premise that he rode pillion on the motorcycle ridden by SP5 and was left alone at the crime scene when SP5 stopped the motorcycle to meet a friend. This much he had done through the cross-examination of SP5. Hence it could not be said that his defence is an afterthought as found by the trial judge. **I**

[17] For all the reasons enumerated above, we were with counsel's submission that there were serious misdirections in the findings made by the trial judge which warrants our interference. We opined that the conviction is

unsafe. Hence we allowed the appellant's appeal. Forthwith his conviction and sentence was set aside and substituted with an order of acquittal and discharged.

Appeal allowed, conviction and sentence set aside and appellant acquitted and discharged.

Reported by Ashok Kumar